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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HOWARD WEBBER, Defendant.	No. CR 13-662 RS **UNITED STATES' RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM** **Date: May 23, 2017** **Time: 2:30 PM** **Place: Courtroom #3, 17th Floor**

The United States submits the following response to Defendant Howard Webber's sentencing memorandum (ECF 372), filed May 18, 2017. The government respectfully requests the Court's permission supplement its response orally at the sentencing hearing.

I. Webber's Base Offense Level Is 20 Because the Tax Loss Exceeds $550,000

Webber's base offense level in this case is 20 in light of a tax loss that exceeds $550,000. The Sentencing Guidelines provide that in determining Webber's base offense level, the Court should take into account "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as "all reasonably foreseeable acts and omissions of [Bercovich] in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3. Given that the very goal of Webber and Bercovich's joint criminal undertaking was to file false tax return to generate fraudulent refunds, the filing of any false return by Bercovich was clearly a "foreseeable act" that was "in furtherance of" the conspiracy. All of the tax refunds deposited into IARLS's bank accounts are the fruit of these false returns and are therefore properly part of the tax loss attributable to Webber.

The tax loss here is $610,089.69, which Webber and Bercovich received from the IRS on the basis of 711 false tax returns. As Bercovich testified at trial, IARLS did not file any legitimate tax returns. Accordingly, all of the refunds deposited into IARLS's bank accounts stem from false returns. In his sentencing memorandum, Webber unconvincingly attempts to argue otherwise by pointing out that some refunds were for amounts other than 738 or $857–amounts that are one of the hallmarks of his scheme. Defendant's Sentencing Memorandum (hereinafter Def. Memo), ECF 372 at 6. However, this argument was already raised and rebutted at trial. Indeed, at trial, the defense introduced the 2010 tax return filed in the name of James and Kelly Anderson, which generated a refund of $3,232.98 that was in turn deposited into IARLS's bank accounts. Defendant's Trial Exhibit 2031. The defense argued that the Andersons' return could not be fraudulent because it did not match the pattern of the other false returns. However, as the government's expert witness Revenue Agent James Oertel explained, the Andersons' return was also false. He explained that the amount of income reported on the return, $13,500, maximized the Earned Income Credit for a married couple with one dependent–just as an income of approximately $7,000 maximized the Earned Income Credit for a single person with no dependents. Accordingly, there is no weight to the defense's argument that "deposits that range from $1,143 to $4,400 each have nothing to do with Mr. Webber nor the alleged 'golden number' scheme whereby the taxpayer claims $7,000 in wages." Def. Memo at 6. Rather, as is clear from the trial evidence, Webber and Bercovich *always* filed false returns, *most of which* (but not all of which) reported false income of approximately $7,000 and claimed a fraudulent refund of $738 or $857. Accordingly, the Court should find that the 711 tax refunds received by IARLS are all fruits of the conspiracy and that the tax loss is therefore $610,089.69.

Further, the Court should not reduce this tax loss figure on the basis that a handful of taxpayers would have been entitled to refunds had they filed legitimate returns. The returns Webber and Bercovich filed were entirely false and fraudulent. The fact that some of the returns were *close* to accurate (there has been no evidence that *any* returns were accurate) is pure happenstance. Even a broken clock is right (or in this case *almost* right) twice a day. Further, as the Ninth Circuit held in *United States v. Stargell*, 738 F.3d 1018 (9th Cir. 1018), it is of no moment whether the taxpayer in whose name a *fraudulent* was prepared would have been entitled to a refund had they filed a *non-fraudulent* return. As the court explained:

> Absent evidence to the contrary, it is also reasonable to presume that each of the involved taxpayers would have had to file a *non*-fraudulent return in order to obtain any refund to which he or she would have been entitled. Carrying out Stargell's fraud schemes to their completion, therefore, would have required the IRS to pay the total amount of refunds claimed by Stargell in her 143 fraudulent returns as well as any potential refunds for the non-fraudulent returns filed by the persons named in Stargell's returns, conceivably requiring the IRS to pay a refund twice.

Id. at 1026 n.3 (9th Cir. 2013). Accordingly, the Court should not reduce Webber's tax loss by affording him the benefit of taxpayers' legitimate tax credits when the returns he filed were entirely fraudulent.

Even if the Court were inclined to account for these refunds, it is the defense's burden to establish–for each tax return at issue–that the taxpayer would have been entitled to a refund. And the defense has fallen short of this burden. As the Ninth Circuit has explained, "[i]t is not the government's or the district court's responsibility to establish that [the taxpayers named in the returns filed by Webber and Bercovich] were entitled to refunds if no entitled-refund information was offered by the defendant." *Id.* at 1025; *see also* U.S.S.G. §2T1.1, cmt. 3 ("In addition, the court should account for any unclaimed credit . . . .that is needed to ensure a reasonable estimate of the tax loss, but *only to the extent that* . . . (c) the *defendant* presents information to support the credit . . . sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy.”). Here, the defense has failed to establish how it gets from a tax loss of $610,089.69 down to $550,000.

Finally, the defense attempts to make hay of the difference between Bercovich and Webber’s tax loss. However, there is good reason for this discrepancy. Bercovich, pleaded guilty and provided substantial cooperation to the government. During the course of his cooperation, as it prepared for Webber’s trial, the government discovered approximately $150,000 more in refund checks that were deposited into IARLS bank accounts. In proffers and during his testimony, Bercovich stated that the additional refund checks were fraudulent. While the government can include the additional refund deposits in the loss calculation against Webber, Section 1B1.8(a) of the Sentencing Guidelines prohibits the government from including the additional loss against Bercovich. U.S.S.G. § 1B1.8(a) (“Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.”). Accordingly, this discrepancy has no impact on Webber’s tax loss figure of $610,089.69.

II. Webber Should Not Receive Any Credit for Acceptance of Responsibility

Webber has not “clearly demonstrate[d] acceptance of responsibility for his offense.” U.S.S.G. 3E1.1(a). A “defendant who puts the government to its proof may still be eligible for a downward adjustment if, and only if, he has otherwise demonstrated sincere contrition.” *United States v. Ramos-Medina*, 706 F.3d 932, 940 (9th Cir. 2013); *see also* U.S.S.G. § 3E1.1, cmt. n. 2 (2007). Webber continues to refuse to accept his responsibility in conceiving and implementing a large-scale tax fraud. Webber continues to minimize his responsibility by insisting that a large part of the conspiracy he was convicted of was actually “an entirely different conspiracy Bercovich was running.” Def. Memo at 7.

Also, despite clear trial evidence showing that he directed the amount and timing of payments from IARLS accounts, Webber maintains that "Bercovich alone controlled the money and decided where the proceeds would go." *Id.* at 12. Next, despite ample evidence that he made was responsible for building and maintaining IARLS's client and recruiter network, Webber denies having any managerial or leadership role in the organization. He even goes so far as to assert that he neither managed nor coordinated the recruiters who were incarcerated with him at MSDF, even after these very recruiters credibly testified to the contrary at trial. Instead, Webber offers instead that "[w]hile these inmates may have played chess with Mr. Webber in the dayroom or sat around talking about this fraudulent IRS credit, the recruiting activities at issue were handled by each individual recruiter himself after hearing from Mr. Webber what the scheme was about." *Id.* at 13. Even in his letter to the Court, Webber states he never took actions without getting the agreement of the inmates [he] talked to," even though the trial evidence established he lied to at least some of inmates about the purpose of IARLS and the illegal nature of his scheme. *Id.* at Exhibit A. Accordingly, the Court should not afford Webber any relief on the basis that he has accepted responsibility for his crimes.

III. The Court Should Apply the 2-Level Enhancement for Promotion of Tax Schemes

The Court should apply a 2-level enhancement in light of the fact that Webber was convicted of devising and operating an Earned Income Credit tax scheme from which he derived all of his income. U.S.S.G. § 2T1.4(b)(1) and Application Note 2.[1] Webber, together with Bercovich, owned and operated IARLS, a business entity whose sole purpose became the preparation and filing of false tax returns. Further, as established by the trial evidence, Webber often explained to potential victims that his partner was an attorney and that IARLS could help them take advantage of secret tax loopholes or government

[1] The government is not seeking an enhancement based on the use of "sophisticated means." U.S.S.G. § 2T1.4(b)(1).

subsidies. Accordingly, the Court should apply the enhancement for defendants who promote tax schemes.

IV. The Court Should Apply the 4-Level Organizer/Manager Enhancement

The government has articulated its argument on this matter in its Sentencing Memorandum. However, in light of the defense's arguments, it reiterates that the facts established at trial clearly establish Webber "exercised some control over others involved in the commission of the offense [or was] responsible for organizing others for the purpose of carrying out the crime." *United States v. Avila*, 95 F.3d 887, 889 (9th Cir.1996). For example, Webber exercised some control over Bercovich. Further, Webber recruited, trained, and organized IARLS's recruiters.

V. The PSR Appropriately Concludes Webber Is in Criminal History Category V

As articulated in its Sentencing Memorandum, the government agrees with the PSR's conclusion that Webber is in criminal history category V. The Court should not depart from this calculation.

Webber's criminal history category score reflects a criminal history spanning three decades and includes Webber's conviction on four felony charges (one count of felony criminal threats and three counts of delivering and/or manufacturing cocaine) and several misdemeanors, including theft by contractor, battery, threats, and violating a court order to prevent domestic violence. Further, his criminal history shows that Webber has not been deterred by prior convictions. For example, in 2009, Webber was convicted of battery upon Ms. Zeidler. In 2009, just three years later, his probation was revoked for committing a battery upon and threatening the very same Ms. Zeidler. In addition, in 1997, he "absconded to Panama," despite having been previously convicted of bail-jumping. Parole Commission Action, Exhibit D to First Declaration of Elizabeth Falk (ECF 369-4).

The Court should also take note of Webber's repeated fraudulent conduct–in addition to his conviction for theft by contractor. Three instances are described in the government's sentencing memorandum: one involving fraudulent loan applications in 2008, one involving a fraudulent real estate dealing while on pre-trial release in this case, and one involving a lie to the Wisconsin Parole Commission in 2011. In light of Webber's long history of criminal conduct, the Court should not depart downward from Webber's criminal history category score of V.

VI. Webber Should Receive a Guidelines Sentence to Avoid Disparities

The government reiterates that the best way to ensure that Webber's sentence is not disparate from those convicted of similar crimes is to sentence him within the Guidelines range. None of the cases cited by Webber in his sentencing memorandum support his request for a variance from the Guidelines. For example, in *United States v. Dashner*, 12-CR-646, the defendant, who pleaded guilty to one count of conspiracy to file false claims and was in criminal history category II, received a within-Guidelines sentence of 57 months. In *United States v. Davis*, 10-CR-687, the defendant, who pleaded guilty to conspiracy to defraud the United States and was in criminal history category VI, also received a within-Guidelines sentence of 63 months. The sentence in *United States v. Larkin*, 15-CR-10, also appears to be a within-Guidelines sentence. There, the government, in its sentencing memorandum, recommended finding that the defense had a final offense level of 24 (based on a tax loss of $283,815, a two-level enhancement for preparing tax returns, and a 4-level leader/organizer enhancement) and a criminal history category of II. The Court sentenced Larkin to 37 months, which is consistent with an offense level of 20 and a criminal history category of II. Accordingly, it is a fair inference that the Court disagreed with some of the enhancements recommended by the government but still gave the defendant a within-Guidelines sentence.[2] This Court should follow the examples cited by the defense and sentence Webber within the Guidelines.

[2] Defendant's Sentencing Memorandum did not attach any supporting documents for the other cases it cited: *Tonya Gilard*, *Cherleszetta Brown*, and *Noemi Baez*.

VII. Conclusion

For the reasons set forth above, the United States of America recommends a middle-of-the-Guidenes sentence of 147 months' incarceration, a three-year term of supervised release, restitution of $541,621.07, and a $1,500 special assessment.

Respectfully submitted this 20th day of May, 2017.

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